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No. 83-1191

In the Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE GRAZIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was sufficient evidence to show that petitioner obtained "substantial income or resources" from engaging in a continuing criminal enterprise within the meaning of 21 U.S.C. 848.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 710 F.2d 691.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1983. A petition for rehearing was denied on November 1, 1983. The petition for a writ of certiorari was filed on January 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted on one count of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848; two counts of attempting to import marijuana, in violation of 21 U.S.C. 963; two counts of possessing marijuana with intent to

distribute it, in violation of 21 U.S.C. 841(a)(1); four counts of using a communication facility to facilitate a felony, in violation of 21 U.S.C. 843(b); one count of attempting to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; and one count of conspiring to possess marijuana with intent to distribute it (Pet. App. 7a n.1).

Petitioner was sentenced to the following terms of imprisonment: 30 years on the continuing criminal enterprise count, five years on each attempted importation count, 15 years on each possession with intent to distribute count, four years on each use of a communication facility count, 15 years on the attempt count and 15 years on the conspiracy count. The sentences on the attempt and one of the possession with intent to distribute counts were ordered to run consecutively to each other and, as were all the remaining counts, concurrently with the continuing criminal enterprise count. Petitioner was also ordered to serve two concurrent five-year special parole terms on the possession with intent to distribute counts and fined a total of $530,000.[1]

1. The evidence at trial showed that petitioner participated as a supervisor in two separate attempts to import marijuana and, in addition, arranged for the transportation

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[1]On appeal, after affirming the conviction for operating a continuing criminal enterprise, the court of appeals vacated the conviction and sentence (15 years and $15,000) on the lesser-included conspiracy count (Pet. App. 18a-19a).

Sam Ward, petitioner's co-defendant, was convicted on two counts of attempting to import marijuana, in violation of 21 U.S.C. 963. He was also convicted on one count each of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), using a communications facility to facilitate a felony, in violation of 21 U.S.C. 843, and attempting to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of imprisonment, the longest of which was 15 years; he was also ordered to serve a five-year special parole term on the possession count and fined $125,000.

of marijuana by truck from South Carolina to New York (Pet. App. 15a). The first importation involved an attempt in December 1980 to unload 40,000 pounds of marijuana from a mother ship located 300-500 miles off the coast of Georgia (4 Tr. 237). At a taped meeting, petitioner discussed the off-loading with undercover agents who had agreed to provide an off-load site and crew in the Brunswick, Georgia area (4 Tr. 304-305; GX 1A at 3-4). For their services, petitioner agreed to pay the agents $25 per pound or $1 million (GX 1B at 3).

A Coast Guard cutter was dispatched to look for the mother ship (6 Tr. 93-94). Using information provided by petitioner regarding the location of the vessel, the cutter intercepted a shrimp boat heading toward the drop-off point (6 Tr. 97, 99). After the cutter fired 18 rounds across the shrimp boat's bow, it stopped and permitted the Coast Guard to come aboard. 43,280 pounds of marijuana were discovered on board (6 Tr. 107, 284).

The second importation attempt occurred in January 1981. Petitioner's co-conspirators met with agents to discuss the off-loading of 60,000 to 80,000 pounds of marijuana scheduled to arrive off the coast of Georgia (7 Tr. 187, 189, 191). At one of the meetings, petitioner told the agents that he wanted the marijuana trucked out of Brunswick, Georgia, in refrigerated tractor-trailers packed with some seafood and that he wanted the driver to carry a falsified bill of lading as camouflage (7 Tr. 258). At this meeting, petitioner provided $15,000 of a promised $25,000 in front money, explaining that he had lost money on the December load (7 Tr. 259). After petitioner moved the pick-up point to a less secure place, the agents, at co-defendant Sam Ward's instigation, met with petitioner and demanded that $500,000 be paid before their off-loading vessel would go to the new location. After consulting with a co-conspirator, petitioner

made a counter-proposal, which Ward rejected, and eventually the operation was abandoned (7 Tr. 196-197).

The final operation involved arrangements for the agents to transport 5,000 pounds of marijuana by truck from a South Carolina stashhouse to New York (8 Tr. 139-140, 250). In a bus station meeting, petitioner paid one of the agents $1,900 in front money (8 Tr. 155-156). After a call to confirm plans, the agents met petitioner to receive final instructions (8 Tr. 164, 165). Pursuant to those instructions, two officers were dispatched to pick up the marijuana (8 Tr. 166, 169). At petitioner's request, the officers were provided with a seal and a bill of lading so that they would appear to be making a regular commercial run (8 Tr. 168). Pursuant to arrangements with local law enforcement officials, the officers' truck was stopped and the marijuana was seized, but the federal agents were allowed to "escape" (8 Tr. 169).

2. The court of appeals affirmed all of petitioners' convictions except for the Section 846 conspiracy conviction, which it vacated as a lesser-included offense of the Section 848 continuing criminal enterprise (Pet. App. 18a-19a). The court of appeals held, inter alia, that there was sufficient evidence that petitioner obtained substantial income or resources from engaging in a continuing criminal enterprise (Pet. App. 15a-18a). The court concluded that "resources" within the meaning of the statute includes marijuana acquired as part of the enterprise (Pet. App. 16a). The court reasoned that construing the term "resources" broadly was consistent with Congress's intent to punish professional criminals severely when they engage in continuing criminal drug violations (Pet. App. 17a). Because there was evidence that petitioner had constructively obtained marijuana during the third operation, the court held that the evidence was sufficient to support petitioner's conviction under 21 U.S.C. 848 (Pet. App. 17a-18a).

ARGUMENT

Petitioner contends (Pet. 4-13) that the court of appeals erred in construing the "substantial income or resources" requirement in 21 U.S.C. 848 to embrace receipt of marijuana. The court's interpretation of Section 848 is, however, a reasonable one that conflicts with no decision of this Court or any other court of appeals; further review is therefore not warranted.

As the court of appeals observed (Pet. App. 16a), Section 848 "does not explicitly define the term 'resources.' " Nor does the legislative history provide any direct evidence of what Congress meant by the term "resources"; it is nowhere defined in the reports or debates on the proposed legislation.[2] But if Congress had intended to gauge the size of an operation by consideration only of its monetary proceeds, it seems clear that it would not have included the word "resources" in the statute. By referring to "resources," Congress foreclosed the kind of argument petitioner urges, which makes prosecution of the supervisor of a criminal

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[2]Petitioner emphasizes (Pet. 6) the omission of the word "resources" in two references in the House Report. See H.R. Rep. 91-1444 (Pt. 1), 91st Cong., 2d Sess. 5, 10 (1970). Petitioner suggests that "resources" was thus merely another term for "income." This construction is, however, clearly incorrect. In both instances cited by petitioner, the House Report was not purporting to define the phrase "income or resources," but was merely summarizing the criminal penalties under the Act and used the phrases "substantial income" and "substantial profits" to describe the circumstances in which the heavy penalties of 21 U.S.C. 848 would apply. Thus, it is plainly inappropriate to attach any significance to the omission of the word "resources" in these statements. Indeed, the fallacy of petitioner's argument is illustrated by the second of these two references, in which the Report uses the term "profits" instead of either of the statutory terms "income" or "resources."

enterprise depend upon the conversion of a valuable commodity into cash.[3]

Congress enacted 21 U.S.C. 848 to provide "severe criminal penalties for persons engaged in illicit manufacture or sale of controlled drugs primarily for the profits to be derived therefrom." H.R. Rep. 91-1444 (Pt. 1), 91st Cong., 2d Sess. 10 (1970). In other words, Congress was attempting to proscribe, and punish harshly, the activities of large-scale drug dealers. Whether their gains were monetary or in the form of drugs was immaterial so long as the gains were substantial. See *United States* v. *Chagra*, 669 F.2d 241, 257 (5th Cir. 1982); *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), rev'd on other grounds, 432 U.S. 137 (1977). The court of appeals' construction of the "substantial income or resources" requirement is faithful to this legislative intent.[4]

Nor are the cases petitioner relies upon (Pet. 10-11) contrary to the decision below. He asserts that all prior decisions focus on the financial benefit gained by the defendant and that those cases that focus on the quantity of drugs involved with the enterprise do so only to calculate the financial gain. But it is not primarily the form of the benefit—financial or otherwise—that concerned those

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[3]Petitioner is mistaken that the court of appeals' construction effectively omits the substantial income or resources requirement from the Act. It does not follow ineluctably from the fact that an individual engages in three drug violations in concert with five or more other persons whom he supervises that he obtains substantial income or resources. Even if what he gains in each case is drugs rather than cash, it is not inevitable that the gain is substantial. And, as explained in text, it is the substantiality element that was Congress's principal concern.

[4]There is no merit to petitioner's assertion (Pet. 13) that his conviction was affirmed on a basis different from that presented to the jury in the district court's instructions. The court instructed the jury that resources "means any property that can be converted into supplies or means of raising money for supplies" (6 Tr. 136). Marijuana obviously satisfies this definition.

courts, but rather the substantiality of the income or resources of the enterprise. See, *e.g.*, *United States* v. *Losada*, 674 F.2d 167, 173 (2d Cir. 1982) ("the $2000 figure * * * is not so insignificant as to render the statute inapplicable"); *United States* v. *Chagra*, 669 F.2d at 257 ("appellant obtained several kilograms of cocaine and a large quantity of marijuana * * * which would have brought appellant a handsome return"). Thus, the issue in those cases was very different from that in this case.

Moreover, even without the marijuana, the evidence regarding petitioner's receipt of income or resources was comparable to that found to be substantial in the cases cited by petitioner. Here large quantities of marijuana passed through petitioner's operation and thousands of dollars changed hands during the operation. Compare *United States* v. *Webster*, 639 F.2d 174, 182 (4th Cir. 1981); *United States* v. *Bolts*, 558 F.2d 316, 319 (5th Cir.), cert. denied, 434 U.S. 930 (1977). As the district court held, "[t]he evidence adduced in this case established beyond a reasonable doubt that [petitioner] orchestrated the importation of multi-tonnage quantities of marijuana, that significant amounts of contraband and money changed hands, and that he anticipated a handsome profit from the eventual sale of the contraband" (3 Tr. 709). Compare *United States* v. *Sisca*, 503 F.2d 1337, 1346 (2d Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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